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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of SIEGFRIED RUPPERT and PATRICIA BUSE.	
SIEGFRIED RUPPERT, Appellant, v. PATRICIA BUSE, Respondent.	A137751 (San Francisco City & County Super. Ct. No. FDI-08-767688)

Though married in California, Siegfried Ruppert and Patricia Buse were both German citizens and had a German-language prenuptial agreement. When their marriage deteriorated, Buse sought dissolution in Germany. She obtained a final judgment of dissolution, which, according to her, not only resolved the couple's status, but decided property division questions in accord with the prenuptial agreement. Although Ruppert participated in the German proceedings, he has steadfastly maintained he was never properly served. He also contends the German judgment is far narrower than Buse would have it, and does not in fact address property division. As a result, while the German proceedings were pending, Ruppert filed and has since maintained a dissolution action in California. The California trial court initially stayed Ruppert's action in light of the German proceedings. Once the German proceedings became final, the trial court granted

Buse's motion to quash, gave recognition to the German judgment, and dismissed all "non-children" issues. Ruppert appeals this order. We conclude the trial court appropriately granted comity to the German judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ruppert and Buse, both citizens of Germany living in the United States, married in San Francisco on May 17, 1997.

Two days before, on May 15, 1997, they entered into a prenuptial agreement. The agreement was in German and was recorded before a German consular official in San Francisco. The agreement, which cites various German statutes, but not those of California, "exclude[s] the statutory matrimonial property regime and" instead adopts "the matrimonial property regime of the separation of property pursuant to § 1414 BGB." It also addresses postdissolution spousal support, essentially decreeing there would be none.

Nine years later, in August 2006, Buse petitioned for dissolution in a German family court. She attached a copy of the prenuptial agreement.

Ruppert claimed he obtained notice of the action in early August 2007, when his son found and delivered to him a copy of the petition that had been left in an internal walkway in front of Ruppert's San Francisco apartment. A process server declared he made contact with Ruppert using the apartment building's intercom system on July 31, 2007, and, following Rupert's instructions, slipped a copy of the petition under the apartment building's main door.

On August 1, 2008, Ruppert filed his own petition for dissolution—the instant action—in San Francisco Superior Court. The petition sought joint custody of the couple's children, spousal support, and a determination of property rights. It was personally served on Buse the date it was filed.

Buse, by what she termed a special appearance, moved to quash and, alternatively, to stay or dismiss Rupert's petition, because of the prior German proceeding and because

she viewed California as an inconvenient forum under the doctrine of forum non conveniens. Buse claimed the already-pending German proceeding was for the "same cause" between the "same parties" (Cal. Rules of Court, rule 5.121(a)(2)); Germany's courts, she argued, were first to acquire jurisdiction, and California's courts should accordingly stand aside. Moreover, given the numerous German connections, Buse contended a California forum would be inconvenient. (See Code Civ. Proc., § 418.10, subd. (a)(2).)

Ruppert opposed the motion, claiming the German action was not prior to the California action (because of allegedly defective service) and claiming California was the more convenient forum. In arguing California was the better forum, he claimed only California courts had jurisdiction over child support and child custody matters.[1] He also claimed if the German courts "invalidate[]" the prenuptial agreement, spousal support would have to be litigated in California. He did not contend, at that time, though, that German courts would lack jurisdiction over property division, nor did he contend the German proceeding did not at least raise the same issues of spousal support and property division as his California proceeding.

The California family court, noting the question of proper service was still pending before the German court, stayed proceedings "until [the] German Court [has] . . . determined that there is valid service under California Law." If service were proper, the trial court stated "the motion to quash i[s] granted."

In December 2008, the German family court issued a judgment decreeing Ruppert and Buse divorced and rejecting the claim for "property increment."[2] In a statement of reasons, the court concluded German court jurisdiction was proper given both Ruppert

[1] The parties have since agreed resolution of support or custody for their two California-born children should be resolved in California courts.

[2] Had Ruppert been entitled to property division, he could have sought discovery from Buse regarding her assets in a process called "increments."

and Buse were German nationals. The court rejected Ruppert's claims of defective service and, giving effect to what it viewed as the parties' valid and enforceable prenuptial agreement, denied Ruppert a payment of "equalization" of "pensions" or "accrued gains" following the marriage.[3] It also expressed surprise at Ruppert's challenge to the denial of equalization provided for in the prenuptial agreement, as "there are not any recognizable disadvantages from the marriage" given Ruppert "works as an attorney after getting a second degree in the United States.[4]

Nearly a year later, the Berlin Court of Appeals affirmed the judgment. The main issue on appeal was whether Ruppert was properly served. However, the court found no need to address whether service by leaving the petition for retrieval at Ruppert's apartment building complied with California law, as any defects in service were cured under a German Code of Civil Procedure provision by evidence Ruppert actually obtained, from his son, the materials left for him and was on notice of the German proceeding as of August 2007. The appellate court further held the Hague Treaty on delivering court and out-of-court documents abroad in civil and commercial cases did not preclude it from considering the potentially defective service cured, and that employing the "cure" provision of its Code of Civil Procedure vindicated Germany's important interest in not having trivial formalities prevent just resolution of cases on their merits.

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[3] The assertion in the declaration of Ruppert's German counsel that the court did not rule on the validity of the prenuptial agreement is patently incorrect, and we cannot accept this attorney's misleading characterization of the German court's ruling, which we have in translated form and can read for ourselves. (*Societe Civile Succession Richard Guino v. Redstar Corp.* (2007) 153 Cal.App.4th 697, 701 [interpretation of the language of a foreign court written judgment is for appellate court to review de novo].) The validity of the agreement was integral to the German family court's denial of equalization and denial of discovery into Buse's assets.

[4] Documents filed with the San Francisco court in 2010 show Ruppert making nearly $250,000 a year as an attorney at a large, well-known law firm.

In September 2011, the German Federal Supreme Court issued an order summarily affirming the Berlin Court of Appeals.

With the German proceedings concluded, Buse, in October 2012, asked the California family court to dismiss all "non-children related issues" and to register and enforce, as necessary, the then-final German dissolution judgment. Following a hearing, the family court granted Buse's motion to quash, dismissed "non-children related issues," registered the various German judgments and orders, and retained jurisdiction for enforcement.

Ruppert timely appealed.

DISCUSSION

A respondent in family court "may move to quash the proceeding, in whole or in part, for . . . reasons" including a "[p]rior judgment or another action pending between the same parties for the same cause." (Cal. Rules of Court, rule 5.63(a)(2); see former Cal. Rules of Court, rule 5.121 [allowing the same motion before a renumbering effective January 1, 2013]; see also *Zaragoza v. Superior Court* (1996) 49 Cal.App.4th 720, 724 [noting the provision was also found in former Cal. Rules of Court, rule 1230].) That "[t]here is another action pending between the same parties on the same cause of action" is also a ground for demurrer in an ordinary civil action. (Code of Civ. Proc., § 430.10, subd. (c); see *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 895; *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787.) The doctrine embodied in these enactments—abatement—is the flipside of another doctrine, res judicata, which bars relitigation of matters finally resolved in other actions. (*Hamilton v. Asbestos Corp.*, (2000) 22 Cal.4th 1127, 1146 [viewing pleas in abatement under section 430.10, subdivision (c), and res judicata as both preventing the splitting of causes of action].)

Outright abatement is disfavored, and the "same parties for the same cause" language, found in both California Rules of Court, rule 5.63 and Code of Civil Procedure

section 430.10, "has been strictly interpreted" so that dismissal is only appropriate when " '(1) . . . both suits are predicated upon the same cause of action; (2) . . . both suits are pending in the same jurisdiction; and (3) . . . both suits are contested by the same parties.' " (*Conservatorship of Pacheco* (1990) 224 Cal.App.3d 171, 176 [interpreting Code of Civil Procedure provision].)

Nevertheless, even when the two suits are in different jurisdictions, "the principle of comity may call for a discretionary refusal of the court to entertain the second suit pending determination of the first-filed action." (*Gregg v. Superior Court* (1987) 194 Cal.App.3d 134, 136; see also *Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 575 [stay, not outright dismissal]; *In re Marriage of Gray* (1988) 204 Cal.App.3d 1239, 1249–1250 [" ' "the court in which the second action is brought may in its discretion stay or suspend that suit, awaiting decision in the first one, or, influenced by a spirit of comity, may refuse to entertain it, if the same relief can be awarded in the prior suit" ' "], italics omitted.)

Furthermore, comity might then permit application of res judicata to determine what can and cannot be litigated once the first suit is complete. (*Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746 & fn. 4; see also *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1475 [employing comity to give effect to a foreign judgment]; *Simmons v. Superior Court of Los Angeles County* (1950) 96 Cal.App.2d 119, 122–124; accord, *Laker Airways, Ltd. v. Sabena, Belgian World Airlines* (D.C. Cir. 1984) 731 F.2d 909, 939 ["Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense."]; see also Code Civ. Proc., §§ 1715, subd. (b)(3)(B), 1723 [comity may be used to recognize a foreign judgment, including one for dissolution or otherwise involving domestic relations].)

More broadly, "[t]he doctrine of comity prescribes that a court of this nation recognize the judgment of a court of a foreign nation when the foreign court had proper

jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 314 (*Stephanie M.*).) "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity' in at least three different contexts. In one context, the domestic court considers whether to proceed with litigation properly within its jurisdiction because of the pendency or availability of litigation in a foreign forum. [Citations.] When domestic courts in that context say that they are deferring to foreign tribunals as a matter of 'comity,' [citation], they are invoking a doctrine akin to *forum non conveniens*. . . . [¶] In a second context, a domestic court considers whether to enforce a foreign judgment. [Citations.] Here too domestic courts say that the issue of whether to defer to the foreign tribunal's adjudication of the underlying matter is a matter of 'comity.' [Citations.] . . . [¶] In a third context, . . . a domestic court considers whether to accept the adjudication of a foreign tribunal on a cause of action or a particular issue [citations] . . . as a matter of 'comity.' " (*Diorinou v. Mezitis* (2d Cir. 2001) 237 F.3d 133, 139–140, fn. omitted.)[5]

Here, the trial court initially stayed proceedings under the first "prong" of comity discussed above. This discretionary act is not under review. Later, the trial court gave effect to the German dissolution judgment, employing the other prongs of comity.

We review the ultimate decision to extend comity for an abuse of discretion. (*Stephanie M., supra,* 7 Cal.4th at p. 314.) Although the ultimate decision to extend comity is discretionary, the interpretation of another court's judgment and the determination of a judgment's preclusive effect are generally questions of law we review de novo. (*Societe Civile Succession Richard Guino v. Redstar Corp., supra*,

[5] Thus, foreign judgments can be "recognized" for the purpose of enforcement (as in the case of a money judgment) or "recognition may also be sought so that a party may rely on res judicata or collateral estoppel principles." (*Manco Contracting Co.* (*W.W.L.*) *v. Bezdikian* (2008) 45 Cal.4th 192, 205–206.)

153 Cal.App.4th at p. 701 [interpretation of the language of a foreign court written judgment]; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228 ["Whether the doctrine of res judicata applies in a particular case is a question of law which we review de novo."]; accord, *Diorinou v. Mezitis*, *supra*, 237 F.3d at p. 140.)

Ruppert first asserts the California trial court was required to deny comity to the German judgment entirely because (1) Buse's "fraud," in allegedly not disclosing to the German courts the true nature of her assets and debts, prevented Ruppert from having a full opportunity to present his case; (2) the German judgment is repugnant to policies of California because it issued without Ruppert being properly served under California law; (3) the German forum was seriously inconvenient; and (4) the German proceedings lacked due process.

There was no error or abuse of discretion. To start, issues concerning service, procedure, convenience, and opportunity to participate are mooted by Ruppert's actual participation, at least through counsel, in the German proceedings. Ruppert asserts the German statute allowing defective service to be cured is unique and unfair. Yet California case law also allows just that, and for sound reasons of judicial economy and fairness. *In re Vanessa Q.* (2010) 187 Cal.App.4th 128, 135, holds that if a defendant makes, himself or through counsel, a general appearance—that is, gives some recognition of the court's authority to proceed—defects in service will be considered cured. Ruppert unquestionably made a general appearance in the German proceedings when he requested property increments, argued for equalization, and contested the validity of the prenuptial agreement. Thus, under either German or California law, service was adequate[6] and the

[6] Ruppert fixates on the California trial court's statement it would grant Buse's motion to quash if the German courts decided there had been valid service under California law. This statement did not impose upon the California courts, as Ruppert contends, a requirement to deny Buse's motion if the German courts made no such determination. Nor did it preclude the California courts from granting the motion in the

German courts had jurisdiction.[7] There is, furthermore, no evidence the German courts failed to offer Ruppert a fair judicial process or that Ruppert was prejudicially hindered by having to face proceedings in the country in which he holds citizenship.

In addition, there is no evidence Buse procured the German judgment by fraud so as to deprive Ruppert of a fair hearing. Even if Buse made misstatements regarding her assets, the existence or value of any particular asset was apparently irrelevant to the German courts, as they concluded a division of property was not called for given the parties' valid prenuptial agreement. Moreover, Ruppert "was not prevented from participating in [his] dissolution action" and had every opportunity to "guard against" any relevant misstatements at the time. (*In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 505 [rejecting a claim a prior judgment obtained by extrinsic fraud or mistake].) Finally, Ruppert's loss in the German courts of his motion for asset discovery—for property increments—by no means establishes a fraud by Buse or a deprivation of due process.

Given all this, and given the parties' connections to Germany, the trial court's decision to extend comity to the German judgment was neither an abuse of discretion nor error.

Ruppert next contends the California trial court, even if comity were appropriate, gave the German judgment greater preclusive effect than due. According to Ruppert, the German proceedings were far narrower than the California proceedings, and the California trial court should have realized the German proceedings, even when final, left open several issues the California courts should still rule upon.

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wake of other developments, such as the German courts' finding service was adequate or cured under the laws it deemed applicable.

[7] Ruppert asks us to disregard the German Supreme Court's decision in the German proceedings on the question of whether service was proper under German law. The request is baseless.

To be sure, the German proceedings did not address issues related to the couple's children, but both Ruppert and Buse agree those should be put to a California court.

More to the point, claims Ruppert, he asked the California court to address "non-children-related issues . . . not brought by [Buse] or [Ruppert] in the German" proceedings, such as marital property, spousal support, financial issues, intellectual property issues, "inter-marital agreements," and the validity of the prenuptial agreement.

Again, the trial court did not err or abuse its discretion. First, the German courts plainly addressed non-children issues relating to property division, finding the prenuptial agreement valid (despite Ruppert's various arguments against it), denying equalization, and denying further discovery on Buse's assets. Ruppert, himself, foretold the German courts might render an opinion on the prenuptial agreement in his brief opposing Buse's original motion to quash. This is not a case where the German courts addressed dissolution only, leaving property matters to other courts. (See *Faught v. Faught* (1973) 30 Cal.App.3d 875, 878 ["Under the concept of divisible divorce, financial responsibility and marital status may be separately litigated at different times and in different forums."].)

Second, even if the German proceedings left some matters unresolved, Ruppert has not sufficiently identified them. If property were truly left in "limbo" as Ruppert asserts, it would be his burden as appellant to identify that property and to demonstrate how the California trial court's failure to divide it was prejudicial error requiring reversal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) ["[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice."]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265 [rejecting argument raised in conclusory fashion].) Ruppert's description of unresolved issues in the vaguest possible terms, employing categories such as "marital property," does not meet his appellate burden. The only particular asset he arguably mentions as left in limbo (arguably,

because he mentions it only in a statement of facts, not in connection with his arguments regarding the narrower scope of the German proceedings) is a "joint marital home" to which Buse referred in her declaration to the German courts. Thus, the property was before the German courts. Moreover, there is no discussion, let alone cited record evidence, of who currently owns the home and whether any court action is actually required. (Cf. *In re Marriage of Moore & Ferrie* (1993) 14 Cal.App.4th 1472, 1481 [a specific pension determined to be community property was obviously omitted from an otherwise comprehensive Ohio state judgment of dissolution, and it could be divided in a subsequent California action].)

Even had Ruppert articulated specific unresolved matters requiring California court intervention, which he has not done, Ruppert has failed to show he did anything to have the German courts rule on those matters. Beyond that, Ruppert has made no argument the German courts lacked the authority to reach any such issue. Under basic principles of res judicata, a final judgment precludes relitigation of matters which were raised or could have been raised in the first action. (*In re Marriage of Mason* (1996) 46 Cal.App.4th 1025, 1028; *In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 638.) This is generally so for divorce judgment as well (*ibid.*), except res judicata does not bar division of community property assets not resolved in an initial judgment. (See *In re Marriage of Moore & Ferrie*, *supra*, 14 Cal.App.4th at pp. 1481–1482; Fam. Code, § 2556 [codifying this continuing jurisdiction of family courts].) As just noted, however, Ruppert has not established the existence of any specific community property assets left unresolved by the German proceedings which require the attention of the California courts, and so cannot take advantage of this exception on appeal. Indeed, insofar as there might have been community property, the German proceeding adopted the parties' prenuptial agreement and therefore ruled out the existence of such community property, denying "equalization" of "accrued gains." (See *In re Marriage of Thorne & Raccina*,

supra, 203 Cal.App.4th at p. 502 [where prenuptial agreement resolves property issue, there is no community property issue left to resolve].)

And further, assuming German law, and not California law, governs our determination of the German proceeding's res judicata effects (see *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 494; 7 Witkin, California Procedure, Judgment § 356 (5th ed. 2008), at p. 973; but see *Alfadda v. Fenn* (S.D.N.Y. 1997) 966 F.Supp. 1317, 1329–1330 ["a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment"]), it would be Ruppert's appellate burden to demonstrate how German law would require reversal of the trial court's ruling, which we presume is correct regardless of its reasoning. (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1470 [no prejudicial error absent demonstration of what foreign law would have required].) Ruppert has not attempted to do so.

Finally, Ruppert spends a number of pages in his appellate briefs attacking the validity of the parties' prenuptial agreement. In the California trial court, Ruppert never made such a challenge in connection with opposing Buse's motion to quash. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

Even if the issue were not waived, Ruppert's challenge to the validity of the prenuptial agreement based on procedural defects[8] is nothing more than a collateral attack on the German proceedings, in which the agreement was plainly held valid and enforceable. Such collateral attacks are ordinarily precluded by the species of res judicata known as collateral estoppel or issue preclusion—at least under United States

[8] Ruppert contends the prenuptial agreement did not comply with various formalities imposed by Family Code sections 1610–1617.

and California law. (See *Taylor v. Sturgell* (2008) 553 U.S. 880, 892; *People v. Garcia* (2006) 39 Cal.4th 1070, 1077.) Ruppert again has offered no contrary German law.

Moreover, we see no abuse of discretion insofar as the California trial court's orders recognize and give effect to this aspect of the German judgment under principles of comity. The prenuptial agreement's validity was actually litigated in Germany. In fact, the German family court's statement of reasons shows there were multiple filings from Ruppert regarding the issue, and it shows the German court addressed and rejected Ruppert's contentions the agreement was against morals, he was rushed into signing, and he suffered from having an inferior bargaining position. Here on appeal, Ruppert's challenges to the agreement are solely procedural, and he cites no particular injustice or hardship he faces or might face under it. Ruppert's actual participation in the German proceedings, the lack of a challenge to the legitimacy of the German judiciary, the lack of an identified substantive unfairness in the agreement, and the need for finality all support the conclusion the trial court's application of comity was neither an abuse of discretion nor error. (See *Huntington v. Huntington* (1953) 120 Cal.App.2d 705, 710 [if defendant "did participate in [a foreign divorce] action . . . the defendant is inhibited from making a collateral attack upon the decree]; *Chaudry v. Chaudry* (N.J. Super. Ct. App. Div. 1978) 159 N.J.Super. 566, 576 ["An analysis of the opinion of the appellate court in Pakistan satisfies us that the validity of the divorce was amply litigated and determined there in that country" such that comity should be granted.]; see generally *Stephanie M.*, *supra*, 7 Cal.4th at p. 314.)[9]

[9] Even if the German courts were operating under German law in assessing the prenuptial agreement's validity, and even if that law differs from California's statutory protections (see *supra*, note 9), that would not mean comity should be denied. (*Java Oil Ltd. v. Sullivan* (2008) 168 Cal.App.4th 1178, 1192 ["That there is a difference in the law of the two countries does not show that the [foreign] law applied is repugnant to California public policy."].)

DISPOSITION

The family court's order is affirmed. Respondent to have costs on appeal.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.